DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-184239 ✓B-183984 DATE: NOV 13 1975

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MATTER OF: Disability pay and allowances - PFC Glenn S. Biederman, ARNG

DIGEST:

1. National Guard member who was injured on annual training duty prior to August 18, 1972, the date of 52 Comp. Gen. 99, may have his entitlement to disability pay determined under the new rule announced in that decision since, although the decision was not retroactive, no final determination had been made in the member's case prior to the date of that decision.

2. National Guard member injured during annual training, and found disabled during remainder of that duty, who upon release from such duty sought military and civilian medical care, was shown absent (sick) from subsequent drills, whose medical records were lost causing long delay in having military medical evaluation performed and who was found unfit for normal military duty by service medical personnel is entitled to pay and allowances during period of disability ending when officially determined fit for duty.

This action is in response to letter dated April 18, 1975 (file reference AFZD-CM-F), from Major Craig W. Thompson, FI, Finance and Accounting Officer, Headquarters, Fort Devens, Massachusetts, requesting an advance decision as to whether payment may be made to Private First Class Glenn S. Biederman, SSN 028-34-3925, ARNG, on a claim for disability pay and allowances as a result of injuries sustained on August 14, 1971, while on annual training duty with the Massachusetts Army National Guard. The request was forwarded to this Office by Office of the Comptroller of the Army letter dated May 20, 1975 (DACA-FAF-P), and has been assigned control number DO-A-1238 by the Department of Defense Military Pay and Allowance Committee.

The Finance and Accounting Officer in submitting this claim for decision, notes that although the member did not attend any drills during the period of his incapacitation, he did attend annual training periods in June 1972 and May 1974. In this regard, he questions

whether the claim would come within the purview of our decision B-148324, B-175376, August 18, 1972 (52 Comp. Gen. 99), which changed the construction of the laws relating to the entitlement of Reserves and National Guard members to pay and allowances during periods of disability.

The file shows that on August 14, 1971, the member, while on annual training duty with the Massachusetts National Guard at Camp Edwards, Massachusetts, tripped and fell, sustaining an injury. Apparently, he was immediately taken to Otis Air Force Base Dispensary where his injury was diagnosed as an acute lumbosacral strain, with the indicated treatment being resting in quarters for the remainder of the training period and daily therapy at the dispensary.

On August 24, 1971, the member's attending service physician prepared his physical profile report. That report stated that the member, having sustained a low back strain, was medically qualified for general military service, but was restricted from performing duty involving bending, stooping, running, marching, prolonged standing or walking until September 7, 1971. That report stated further that the member was to report to the nearest military medical facility for further evaluation at that time.

The member apparently continued experiencing back pain following completion of his annual training duty on August 28, 1971, and from the fall of 1971 to the spring of 1972 he frequently visited the Chelsea Naval Hospital where he was under the care of a Naval orthopedic surgeon. Included in the file are copies of clinical records dated October 22 and 28, and November 11, 1971, which show that the member received treatment on these dates for low back pain. In this regard, it is noted that the clinical records dated October 22 and 28, 1971, indicate, among other things, that the member's treatment included "strict bed rest" for one to two weeks, whereas the November 11 report states that he should not return to his National Guard drills "for at least one month" and that his "activity must be limited."

In correspondence dated February 20, 1975, the member states that he was told in the spring of 1972, that the Chelsea Naval Hospital was being phased out and that he would have to seek help elsewhere. He indicated further that he felt that very little was being done for him and, therefore, sought the help of a private

physician. In this regard, the file includes letters dated June 28, 1972, and June 7, 1973, from Ronald F. Kaplan, M.D., in which the member's condition was diagnosed as a possible nerve root compression and contained the statement that he should absolutely not attend National Guard meetings and further, that he should be discharged from the service.

The record also includes a report of a retention physical examination performed on August 16, 1972, at Headquarters, 114th Medical Battalion, Boston, Massachusetts, in which the member's back condition was provisionally diagnosed as a possible herniated disc with the notation made that he should be further evaluated at Fort Devens, Massachusetts.

Following that examination, the member contends that he was instructed by Colonel Murphy, the Commanding Officer of the 114th Medical Battalion, to follow his civilian physician's advice and not attend National Guard drills, and that an appointment would be made for him with the orthopedic clinic at Fort Devens for this evaluation. The member further contends that after hearing nothing from Colonel Murphy's office for three weeks, he called Colonel Murphy's office, and in fact made at least 30 calls to that office from the fall of 1972 to the spring of 1974, regarding this medical evaluation, and that finally, in the spring of 1974, the 114th Medical Battalion admitted to him that his records were lost.

The record shows that through the member's efforts, the State Adjutant General's Office arranged an appointment for a medical evaluation of his condition on March 26, 1974, at Fort Devens for the purpose of determining his fitness for further military duty or for separation by reason of physical disability. A report of that evaluation, dated March 27, 1974, states that the member had a probable "herniated nucleus pulposus L45 or L5-S1 on left," and further stated in part as follows:

> "Recommendations: Patient is currently fit for duty but should be evaluated by a neurosurgeon for possible consideration for surgery. Since this was an active duty related injury the patient will have to be admitted to Cutler Army Hospital Ft. Devens Mass. and transfered to the Neuro - surgical Service Walter Reed Army Medical Center Washington, D.C. for further evaluation."

By letter dated March 29, 1974, the member was advised that the medical evaluation had found him fit for duty and directed him to report to the commanding officer of his National Guard unit to begin drills commencing April 20, 1974. The letter further directed the member to discuss with his commanding officer at that drill his intentions and plans for receiving the military physical treatment recommended during his March 26, 1974 physical evaluation.

The record indicates that Private Biederman was in no way responsible for his medical records being lost or misplaced or for failure of his unit to take the necessary action to obtain timely medical treatment for him. In fact, despite the timeliness of the member's reporting the injury, it was not until May 17, 1974, that an official determination was made that his injury was incurred in line of duty.

The record indicates that the member was listed as absent, sick, for most of his unit's drills from October 1971 through October 1974. While he was apparently required to attend the annual training periods of June 13-17, 1972, and May 4-18, 1974, he contends that his activities there were minimal; that he was confined to working in a hard back chair; and that he was not required to spend his nights in the camp area.

Under the provisions of 37 U.S.C. 204(h) (1970), a member of the Army National Guard is entitled to the pay and allowances provided by law or regulation for a member of the Regular Army of corresponding grade and length of service, whenever he is called or ordered to perform active duty for training under 32 U.S.C. 502, 503, 504, or 505 (1970), and is disabled in line of duty from injury while so employed.

The right to active duty pay and allowances under that provision of law and similar provisions applicable to members of the Reserves is based upon physical disability to perform military duty, not his normal civilian pursuit, and the determination as to how long the disability continues is left to the exercise of sound administrative judgment. In each case the service concerned is to determine when the injured member recovers sufficiently to be fit to perform his normal military duties or to determine that he should be separated for disability. See 43 Comp. Gen. 733 (1964), and 52 Comp. Gen. 99, supra.

Prior to our decision of August 18, 1972, 52 Comp. Gen. 99, supra, this Office had followed the rule enunciated in 37 Comp. Gen. 558 (1958), requiring termination of pay and allowances when a member is temporarily authorized or directed to perform limited military duties pending recovery from an injury or disease. In the August 18, 1972 decision it was stated that we would no longer follow that rule and instead it was stated at page 104 as follows:

> "In disability cases, especially where the member is disabled but is not hospitalized, it seems to us that such member has a responsibility not only to promptly report his injury or disease, but also his current disability status from time to time to the proper military authorities in order that proper action may be taken currently in his case to retire him, separate him from the service, etc., or refer him to the Veterans Administration. See 47 Comp. Gen. 716 (1968). His failure to do so should be at the risk of loss of benefits.
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> "In short, where the member cooperates with the services so that appropriate administrative determinations may be made currently by the proper military authorities with respect to his disability resulting from injury or disease, this Office will not question otherwise proper payments of pay and allowances under 37 U. S. C. 204(g), (h), and (i) even though the member may perform some military duty in a limited duty status if the record establishes that proper action was taken in the member's case promptly to comply with the regulations. On the other hand, in cases where the record fails to establish that the member promptly notified the proper military authorities and kept them advised currently concerning his condition, we believe a basis for denial of pay and allowances may exist."

In that decision it was also indicated that since that decision is tantamount to a changed construction of law, it will not be given retroactive application. However, it was indicated that in cases pending at the date of that decision (August 18, 1972) where no final

action had been taken, such cases may be considered as coming within the purview of the decision. Therefore, since Private Biederman's case was pending on that date without any final action having been taken, it may be considered under the rule of that decision.

It is clear from the record that Private Biederman's injury was promptly reported. It is also clear that from the time of his injury to the end of the August 1971 annual training period he was unfit to perform his military duties since on the orders of the attending military physician, he spent that time either resting in his quarters or undergoing physical therapy at a military hospital. It appears that upon his release from that annual training period he was still unfit to perform normal military duties since his physical profile dated August 24, 1971, directed him to report to the nearest military medical facility after his release from training duty and it stated that he had a low back strain and was restricted from bending, stooping, running, marching, prolonged standing or walking.

Since the member was listed as absent, sick, from almost all of his unit's drills held during the period of his claim, it appears that he kept his unit advised of his status. It also seems clear that the long delay in scheduling a military medical evaluation in his case was not caused by him, but resulted from administrative inefficiency including the loss of his medical records. Also, his attendance at annual training duty during June 1972 appears to have been in a limited duty status, especially since the examination of August 16, 1972, indicated that the injury sustained may be of greater import than merely a low back strain.

Based on the foregoing, it is our view that the member was unfit to perform his normal military duties on August 14, 1971, the date of his injury, with disability from that injury continuing almost uninterrupted from then until March 27, 1974, the date of the official medical evaluation which determined that he was again fit for duty.

Accordingly, Private Biederman's claim may be allowed for the period August 14, 1971, through March 27, 1974, less any amounts he has already received for duty performed during that period. However, payment may not be allowed on the present record for the amount claimed for incapacitation subsequent to March 27, 1974, since on that date he was officially found fit for military duty and the record does not contain an official determination that he was unfit for military duty thereafter.

B-184239
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The vouchers received with the submission are being returned, with payment thereon being authorized on the basis indicated above.

R.F. KELLER

Deputy

Comptroller General
of the United States